DATIN MELATI ABDULLAH & ORS

v.

SYED HASSAN SYED SALIM (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-738-1997]
3 MAY 1999

CIVIL PROCEDURE: *Affidavits - Admissibility - Jurat - Whether defective - Whether affidavit irregular - Deponent thumbprinted instead of signing affidavit - Whether deponent illiterate - Rules of the High Court 1980, O. 41 rr. 3, 4*

CIVIL PROCEDURE: *Administration of estates - Administrator - Removal of - Sufficient cause - What constitutes - Failure to perform duties - Failure to protect estate and interests of beneficiaries - Failure to oppose action brought against estate - Hostility amongst co-administrators - Whether adverse to due and proper administration of estate and interests of beneficiaries - Wishes of beneficiaries - Probate and Administration Act 1959, s. 34 - Rules of the High Court 1980, O. 80 r. 2(3)(e)*

This was the plaintiffs' application to remove the defendant as an administrator of the estate of one Syed Salim Hassan Alattas ('the estate'). The issues that arose for determination were: (i) whether the jurat in the plaintiffs' joint affidavit in support of the application ('encl 2') was defective for transgressing O. 41 r. 3 of the Rules of the High Court 1980 ('the Rules'); and (ii) whether there was 'sufficient cause' to remove the defendant pursuant to s. 34 of the Probate and Administration Act 1959 ('the Act') and O. 80 r. 2(3)(e) of the Rules.

Held:

[1] The defendant did not offer any evidence to show that the 1st plaintiff was illiterate. Encl 2 was in the Malay language and the plaintiffs who affirmed it in the Malay language were Malays who should understand the language. Furthermore, the Commissioner of Oaths concerned had explained the contents of encl 2 to the plaintiffs before the 1st plaintiff thumbprinted on it and the 2nd and 3rd plaintiffs signed on it. Even if encl 2 was irregular in form, which it was not, it could still be used in evidence with the leave of the court under O. 41 r. 4 of the Rules. Also, there is no presumption of law that a deponent who thumbprints (as opposed to signing) an affidavit is an illiterate.

[2] The defendant was apathetic and had failed to perform his duties as an administrator of the estate. He had failed to protect the estate and the rights and interests of the beneficiaries. He had, *inter alia*, failed to file an affidavit in reply to an action brought against the estate. There were also hostilities between the defendant and the other co-administrators which could not be disregarded. All these were adverse to the due and proper administration of the estate and the interests of the beneficiaries. Furthermore, 18 of the 23 beneficiaries had resolved to have the defendant removed. There was, therefore, sufficient cause for the defendant's removal.

[Application allowed with costs; defendant removed as administrator.]

Case(s) referred to:
Blamey v. Blamey [1902] WN 138 ***(refd)***
Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1998] 4 CLJ 81 ***(foll)***
Datin Melati & Ors v. Syed Hassan Syed Salim [1999] 5 CLJ 582 ***(refd)***
Eddowes v. Argentine Mercantile Agency Co 38 WR 629 ***(refd)***
Fazil Rahman & Ors v. AR S Nachiappa Chettiar [1963] 29 MLJ 309 ***(refd)***
Ravi Suppiah S v. Timbalan Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 ***(dist)***
Re Cloake 61 LJ Ch 69 ***(refd)***
Re Longstaffe 52 LT 681 ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, ss. 2, 34
Rules of the High Court 1980, O. 41 rr. 3, 4, O. 80 r. 2(3)(e)

Other source(s) referred to:
Thayer, Preliminary Treatise on Evidence at the Common Law, p 309

For the plaintiffs - Fadzilah Mansor; M/s Jackson & Masacorale
For the defendant - Joseph Mathews; M/s Radzuan Ibrahim & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

This judgment was an offshoot of a previous judgment which had since been reported in the popular local law journal *vide Datin Melati & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ Supp 582 and that judgment revolved on the defendant's application in encl. 11 to extend time to file an affidavit in reply and I had dismissed encl. 11 with costs. That judgment must have gone well with the defendant because he withdrew his appeal and this opened the door for this court to hear encl. 3. When the defendant filed encl. 11, the defendant sought to extend time to file an affidavit in reply that was affirmed by the defendant on 13 February 1998 and filed surprisingly on 11 February 1998 as reflected in encl. 7. So when this court dismissed encl. 11 with costs, it meant that encl. 7 too was not received by this court. In short, encl. 7 fell like a deck of cards together with encl. 11. Enclosure 7 was expunged by this court.

Enclosure 3 was an application by the plaintiffs to remove the defendant as an administrator of the estate of Syed Salim bin Hassan Alattas and encl. 3 was filed on 13 August 1997. Enclosure 3 was supported by an affidavit of Datin Melati binti Abdullah that was affirmed on 11 August 1997 and filed on 13 August 1997 as seen in encl. 2. By way of a rebuttal, the defendant affirmed an affidavit in reply on 13 July 1998 which was filed on the same date and this can clearly be seen in encl. 17.

Miss Fadzilah Mansor, learned counsel for the plaintiffs, in a style of her own objected to the defendant using encl. 17 as a reply to encl. 2. It was her submission, and a correct one at that, that encl. 17 was an exact replica of encl. 7. It was plain and obvious that encl. 17 was filed by the law firm of Messrs Radzuan Ibrahim & Co. knowing fully well that it was an exact replica of encl. 7. Indeed Mr. Joseph Mathews for the defendant agreed that he had no basis whatsoever for using encl. 17 as a reply to encl. 2 for the simple reason that this court had earlier on dismissed encl. 11 with costs. Mr. Joseph Mathews even submitted that the decision of this court in regard to encl. 11 was final and I may add conclusive.

Mr. Joseph Mathews knew that the chips were down but all the same he half-heartedly argued, by way of a preliminary objection, that the jurat in encl. 2 was defective as it contravened O. 41 r. 3 of the Rules of the High Court 1980 ("RHC"). In a surprise move he then withdrew the preliminary objection and left it entirely to this court to decide. Order 41 r. 3 of the RHC states as follows:

> Where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that:
>
> (a) the affidavit was read in his presence to the deponent;
>
> (b) the deponent seemed perfectly to understand it; and
>
> (c) the deponent made his signature or mark in his presence;
>
> and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

and if it appears that the deponent is an illiterate and the affidavit sworn by the deponent had not been read over to the deponent in the presence of the Commissioner for Oaths, then the affidavit would be ordered to be taken off the file (*Re Longstaffe*, 52 LT 681). Should I order the affidavit in encl. 2 to be taken off the file? Enclosure 2 is the joint affidavit of three personalities. All the three plaintiffs affirmed the affidavit in encl. 2 and only Datin Melati bte Abdullah thumbprinted the affidavit. The other two personalities signed the affidavit in encl. 2. The affidavit in encl. 2 was in the National Language – Bahasa Malaysia, and the three personalities who were Malays should understand the language. There is no proposition of law to say that a person who thumbprints an affidavit is said to be an illiterate. *The Concise Oxford Dictionary*, 9th edn, defines the word illiterate as "unable to read", and "uneducated." There was no affidavit evidence emanating from the defendant to say that Datin Melati bte Abdullah is in fact an illiterate. I am not prepared to conjecture that just because Datin Melati bte Abdullah thumbprinted encl. 2, she must be deemed to be an illiterate. At any rate, the affidavit in encl. 2 contained a phrase by the Commissioner for Oaths and it was worded thus:

> Diterangkan oleh,
>
> Sgd.
> ...
> Rusly bin Mohd. Yunus
> Jurubahasa Melayu Tingkatan Kanan
> Mahkamah Tinggi Malaya
> Johor Bahru
> Johor.

and this phrase was embossed onto the affidavit in a stamp chop style below the actual attestation of the three personalities. This showed that the Commissioner for Oaths had explained to the deponents the contents of encl. 2 before the deponents signed and thumbprinted the same. If the deponents to encl. 2 appeared to the Commissioner for Oaths to be illiterate, then the Commissioner for Oaths must certify that:

(a) the affidavit was read in his presence to the deponents;

(b) the deponents seemed perfectly to understand the affidavit; and

(c) the deponents made his signatures or marks in his presence.

Here, Mr. Rusly bin Mohd. Yunus, a senior and capable Malay interpreter of the Johor Bahru High Court who doubled up as the Commissioner for Oaths had explained the contents of the affidavit in encl. 2 to the deponents. If the deponents were illiterates, I am sure Mr. Rusly bin Mohd. Yunus would certify following closely the requirements of O. 41 r. 3 of the RHC. A senior Malay interpreter like Mr. Rusly bin Mohd. Yunus is quite familiar with the method of administering an oath under the RHC to a deponent of an affidavit. That would be his daily chore, more of a routine than anything else and judicial notice can be taken of this fact. To me, the doctrine of judicial notice is "an instrument of great capacity in the hands of a competent judge ... not nearly as much used in the region of practice and evidence as it should be" (per *Thayer, Preliminary Treatise on Evidence at the Common Law 309*). The scope of judicial notice too can never be closed. It is a subject that will continue to grow from time to time. The doctrine expedites the hearing of the bulk of the cases. Much time would be wasted if every fact which was not admitted had to be proved by calling witnesses, which in most cases would be costly and difficult to obtain. The existence of the doctrine produces a semblance of uniformity in decision affecting matters of fact where a diversity of findings might cause undue embarrassment. It is with enthusiasm that I apply the doctrine in this case. Unlike the case of *Ravi a/l Suppiah, S. V. Timbalan Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152 where the affidavit of the deponent was affirmed in Bahasa Malaysia and the deponent signed in Tamil, here the scenario was entirely different. The three personalities who deposed the affidavit in encl. 2 were Malays and they affirmed the affidavit in Bahasa Malaysia. Factually speaking, the facts here are no where near that of *Ravi's* case.

Order 41 r. 4 of the RHC would certainly save the day for the plaintiffs because it categorically states that an affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof. In my judgment, there was no irregularity to the affidavit in encl. 2. Even if there was such an irregularity, it did not affect the substance nor did it affect the actual contents of the affidavit. The courts have been magnanimous in the past in receiving defective affidavits. In *Re Cloake* 61 LJ Ch 69, the interlineation in the affidavit was not initialled by the notary before whom it was sworn but the court there allowed it to be filed. In *Eddowes v. Argentine Mercantile Agency Co.*, 38 WR 629, the

court accepted the affidavit notwithstanding that the words "before me" were omitted from the jurat. In *Blamey v. Blamey* [1902] WN 138, the court allowed affidavits sworn in America to be filed even though the title was omitted. Here, I too am magnanimous. There was nothing irregular in the affidavit in encl. 2 and I have no qualms in accepting it.

Mr. Joseph Mathews had nothing to say by way of a reply. He adopted a defeatist attitude. He said he had no leg to stand on and he implored this court to dismiss the preliminary objection with costs. That was an excellent example of a perfect gentleman, a member of that noble profession. I then dismissed the preliminary objection with costs.

I will now proceed to the heart of the matter. Enclosure 3 was an application by the plaintiffs to remove the defendant as one of the administrators of the estate of Syed Salim bin Hassan Alattas and it was supported by an affidavit in encl. 2. These two enclosures stood together, unchallenged and it went full steam ahead. Enclosure 3 sought for the following prayers:

1. Bahawa Syed Hassan bin Syed Salim, iaitu Defendant yang dinamakan di atas, diberhentikan dari menjadi salah seorang Pentadbir Estet Syed Salim bin Hassan Alattas;

2. Bahawa kos permohonan ini dibayar oleh Defendan; dan/ataupun

3. Lain-lain Perintah atau yang selanjutnya yang dianggap suai dan menasabah oleh Mahkamah Mulia ini di dalam keadaan ini.

Section 34 of the Probate and Administration Act 1959 enacts that any probate or letters of administration may be revoked or amended for any sufficient cause. Order 80 r. 2(3)(e) of the RHC gives this court the necessary power to entertain encl. 3 and that Order is worded as follows:

> an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.

As to the meaning to the words "sufficient cause" appearing in s. 34 of the Probate and Administration Act 1959, I need to refer to the case of *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268, where Shaik Daud JCA said at p. 270 to p. 271 of the report:

> It is pertinent at this stage to examine the law on the power of the court to revoke a grant of probate or letters of administration. Section 34 of the Act provides that:
>
> > Any probate or letters of administration may be revoked or amended for any sufficient cause.

The power to revoke a grant of probate is vested in the High Court and may be exercised if the court is satisfied that there is sufficient cause to do so. In spite of this power it cannot be gainsaid that we are sensitive that the courts generally would be slow to interfere with the express wishes of a testator. Nevertheless section 34 of the Act empowers the court to interfere if sufficient cause is shown. The crucial question is what amounts to sufficient cause. The phrase 'sufficient cause' has not been defined anywhere. In *Re Khoo Boo Gong (decd); Khoo Teng Seong v. Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68, the Federal Court had occasion to consider that same phrase and at page 69 of the report the following was expressed:

> The power to revoke a grant of probate or letters of administration is vested in the High Court by section 34 of the Probate and Administration Act 1959 and can be exercised for 'any sufficient cause'. However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President, in *In the Goods of William Loveday* [1900] P 154: 'the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto,' then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.

(see also *Fazil Rahman & Ors v. AR S Nachiappa Chettiar* [1963] MLJ 309 at page 310; and *In the Goods of William Loveday* [1900] P 154). The same test was adopted by the High Court in *Tan Khay Seng v. Tan Kay Choon & Anor* [1990] 1 MLJ 51 at page 54. In Australia and New Zealand, the test appears to be whether the executor is fit to act, but the line of cases shows that the court adopted the sufficient cause test (see *Hunter v. Hunter & Anor* [1937] NZLR 794 (SC) and *Shaw v. Thomas* [1954] NZLR 585 (SC)). From the line of cases, it can be seen that the courts have considered the welfare and interests of the beneficiaries of the estate as the paramount criteria in deciding whether or not there are any sufficient cause to interfere.

In *Fazil Rahman & Ors. v. AR. S. Nachiappa Chettiar* [1963] 29 MLJ 309, Suffian J (who retired as the Lord President of the Supreme Court) aptly said at p. 310 of the report:

> Section 34 of the Probate and Administration Ordinance No. 35 of 1959 says that I may revoke the administrator's appointment 'for any sufficient cause.' This is nowhere defined or explained by the Ordinance but Jeune P. says in *In the Goods of William Loveday* [1900] P 154 at page 156:
>
> > After all, the real object which the Court must always bear in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto ...
>
> So what I have to consider here is whether the due and proper administration of the estate and the interests of the deceased's children require that the administrator's grant be revoked.

I do not think so.

There is no allegation as already said that the administrator has in any way been guilty of maladministration.

A perusal of encl. 2 showed that there were numerous grounds to justify the removal of the defendant as the administrator of the estate of Syed Salim bin Hassan Alattas. Without a doubt, the defendant miserably failed to carry out his duties as an administrator of the estate. The defendant had failed to file any affidavit in reply in civil suit no: 22-462-93 in order to protect the estate and its beneficiaries particularly rights and interests of the beneficiaries in the said estate. The omissions by the defendant were very grave. It had endangered the estate and its properties. It was said that the continuance of the defendant as an administrator would prevent the estate from being properly administered. There were hostilities between the defendant and the co-administrators. The hostility persisted and prevailed. On hostility, Shaik Daud JCA in *Jigarlal Kantilal Doshi (supra)* had this to say at p. 273 of the report:

> While it is true that friction or hostility between the parties *per se* may not be a good reason for the removal of the appellants as the executrix and the executor, such hostility if grounded in the manner in which the estate is being administered or not being administered, is a matter that ought not to be disregarded. In this respect Lord Blackburn in *Letterstedt (Now Vicomtesse Montmort) v. Broers & Anor* [1884] 9 AC 371 at page 389 said:
>
> > It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.
> >
> > Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

One must not forget that administrators exist for the benefit of the estate and its beneficiaries. The defendant certainly had acted to the detriment of the estate and its beneficiaries and his removal would be a blessing in disguise. The facts as set out in encl. 2 were self explanatory. It established beyond peradventure that the removal of the defendant was for the good of the estate as a whole. One thing was certain. This court had a duty to

perform and that would be to ensure an expeditious and economical administration of the estate. This can only be done by removing the defendant from his post.

The grant of letters of administration to the estate of Syed Salim bin Hassan Alattas was extracted on 7 August 1977, yet the estate was not properly administered. It was an excessive delay of more than 21 years. It was deposed that the defendant was uncooperative and was not concerned with matters pertaining to the estate notwithstanding constant reminders by the co-administrators and the other beneficiaries to the estate. It was deposed that a part of the land held under Lot 7349 grant 26993 was acquired by the government and the monies derived from it were not banked in for final distribution to the beneficiaries of the estate because the defendant refused to open a joint account with the co-administrators. Since January 1997, the majority of the beneficiaries were frustrated as they were not able to utilise the monies arising from the acquisition. Some of the beneficiaries needed the monies badly for medical purposes. The defendant failed to carry out his duties as an administrator notwithstanding constant reminders by the beneficiaries to the estate. Eighteen out of twenty three beneficiaries were dissatisfied and they resolved that an expeditious administration of the estate can only be achieved with the removal of the defendant from his post.

It is trite law that an administrator is a person appointed by the court to administer the property of a deceased person. An "administration" under s. 2 of the Probate and Administration Act 1959 means, with reference to the estate of a deceased person, letters of administration issued by the Court whether general or limited or with the will annexed or otherwise authorizing the person or persons therein named to administer the deceased person's estate in accordance with law. An "administrator" means a person to whom administration is granted and this is set out in s. 2 of the Probate and Administration Act 1959. Clearly therefore the duties of the defendant as one of the administrators of the estate were onerous and manifold. On the facts, the plaintiffs here have succeeded in showing sufficient cause for the removal of the defendant as one of the administrators of the estate of Syed Salim bin Hassan Alattas and he must accordingly be removed from his post. The costs of the plaintiffs' application in encl. 3 must be borne by the defendant. The upshot of the whole matter was this: encl. 3 prayers 1 and 2 were allowed in favour of the plaintiffs.